LUMBER MART SDN BHD

v.

TAN ENG HOE

HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24NCC-49-2011]
1 JULY 2011

COMPANY LAW: *Accounts - Directors' duty - Refusal by former director of company to sign audited accounts - Whether former director could be compelled to sign - Whether entitled to refuse to sign - Whether application to compel made in compliance with s. 362(2) of the Companies Act 1965*

COMPANY LAW: *Directors - Accounts - Audited accounts - Refusal by former director of company to sign audited accounts - Whether former director could be compelled to sign - Whether entitled to refuse to sign - Whether application to compel made in compliance with s. 362(2) of the Companies Act 1965*

The defendant (a former director of the plaintiff company) and one Lee Choy Lock ('Lee') were the only two directors of the plaintiff company. A dispute arose between the two directors leading to the filing of two petitions by the defendant, under s. 181 and s. 218(1)(f) of the Companies Act 1965 ('the Act'), respectively. The plaintiff, in the present proceedings, sought an order of the court that the audited accounts for the financial year ending February 2009 of the plaintiff company be signed by the defendant as the former director of the company. The application was being made on the basis that there was an earlier order made by consent under the application under s. 218(1)(f) that the defendant, *inter alia*, "shall sign the company's management account and audited account for financial year ended February 2009 ...". The defendant however contended that an ex-director had no proprietary, managerial and any other similar interests in a company. Therefore he was entitled to refuse to sign, consistent with the requirements of ss. 169 and 171 of the Act. He also stated that there was discrepancy of RM3.5 million in the closing stock reflected in the accounts. Nevertheless, the defendant had signed the management account which had the same closing stock figure.

Held (dismissing the application with no order as to costs):

(1) Having considered ss. 362(2) and 4(1) of the Companies Act 1965 it was not possible in law for the court to compel the defendant to sign the audited accounts for the year ending February 2009. (para 4)

(2) An application within the terms of s. 362(2) must be on the part of the Registrar or any member of the company or the official receiver or liquidator. As the present application was not by any of the persons mentioned in the section but was by the company itself, it could not fall within the terms of s. 362(2). (para 4)

(3) The defendant had signed an undated letter of resignation as a director and it was put into effect after he had signed the management account. Hence the management account was signed by the defendant when he was still a director of the company. As the company was the party that had acted on the defendant's letter of resignation without ensuring that he signed the audited accounts first, it could not insist the defendant to sign the audited accounts now. (para 4)

Case(s) referred to:
Haw Par Bros (Pte) Ltd v. Dato Aw Kow [1973] 1 LNS 44 HC ***(dist)***
P.R.M. Abdul Huq v. Katpadi Industries Ltd AIR 1960 Madras 482 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 4(1), 169(5), 171, 218(1)(f), 362(2)

For the plaintiff - KY Leong; M/s S Sothi, Leong & Partners
For the defendant - S Parameswary; M/s Tay, Tee & Nasir

Reported by S Barathi

JUDGMENT

Mohamad Ariff Yusof J:

[1] This case involves a short point of company law. The application by the plaintiff is for an order of this court that the audited accounts for financial year ending February 2009 of the plaintiff company be signed by the defendant as a former director of the company. The plaintiff company submits it is possible for

this court to so order. The defendant on the other hand, maintains otherwise and cites the case of *Haw Par Bros (Pte) Ltd v. Dato Aw Kow* [1973] 1 LNS 44, for the proposition that an ex-director has no proprietary, managerial and other similar interests in a company. Reference is made to s. 169(5) of the Companies Act which mentions the requirement that any two directors of the company may sign its audited accounts. The reference in s. 169, which deals with accounts, is to a director, meaning an existing director who can sign the accounts of the company.

[2] Counsel for the plaintiff company submits the audited accounts for financial year ending February 2009 is for the relevant period when the defendant was a director, and as such it would be in order for this court to order him to sign the audited accounts. The application is now being made on the basis that there is an earlier order made by consent and dated 27 January 2010 in Company's (Winding Up) Petition No. D-28NCC-276-2009, by which it is expressly ordered by consent that the defendant, *inter alia*, "shall sign (the company's) management account and audited account for financial year ended February 2009 …" This is part of the consent order of the Winding Up court, and that being so, it is argued, I am vested with the jurisdiction to now order that the defendant be compelled to sign the audited accounts for this relevant financial year. The evidence shows the defendant has in fact signed the management account of the company, and indeed has also signed the circular resolution of the company authorising the directors to sign the audited accounts of the company. Needless to emphasise, the audited accounts now the subject matter of this dispute is based on the signed management account. Counsel for the plaintiff argues that the court has the inherent jurisdiction in any event to compel the defendant to sign the audited statement. In this regard reference is made to an Indian case, namely *P.R.M. Abdul Huq v. Katpadi Industries Ltd* AIR 1960 Madras 482 in support of this proposition. The following passages in the judgment are referred to:

> A director who has resigned will be deemed to have resigned from the date of his resignation, without prejudice of course, to his liabilities and obligations which had occurred up to that date and which he cannot evade by severing his connections with the company …

A Bearing these principles in mind, if we examine the facts of this case, the Indian Companies Act deliberately makes no provision for exercise of jurisdiction in regard to resignation of directors. This is on the well-recognized principle that courts should not generally interfere in the internal affairs of the company unless
B where the act complained of is *ultra vires* of the company or a fraud on the minority or where there is absolute necessity to waive a rule that there may not be a denial of justice ...

[3] The *Haw Par* case is distinguishable because it relates to a director's right to inspect the books of the company after he has
C ceased to be a director. Upon my prompting that the parties should conduct further research into the matter and ascertain whether there exists any general provision in the Malaysian Companies Act to cover the point, counsel for the plaintiff then cites s. 362(2) of the Companies Act in his support. Section
D 362(2) reads:

(2) If any officer or former officer of the company has failed or omitted to do any act, matter or thing which by or under this act he is or was required or required to do, the court on the application of the registrar or any member of the company or the
E official receiver or liquidator may by order require that officer and former officer to do the act, matter or thing forthwith within such time as is allowed by the order, and for the purpose of complying with any such order a former officer shall be deemed to have the same status, powers and duties as he had at the time
F the act, matter or thing should have been done.

[4] As for the background facts, the defendant and one of the directors Lee Choy Lock, were the only two directors of the company at the material time. There were three shareholders,
G however. The three shareholders at all material times were the defendant, Lee Choy Lock and Lee Choy Lock's wife. The defendant held 30% of the shareholding, Lee Choy Lock 40% and Lee Choy Lock's wife another 30%. Disputes having arisen between Lee and the present defendant, there were two petitions
H filed by the defendants, one under s. 181 and the other under s. 218(1)(f) of the Companies Act. The consent order now being referred to is an order granted under the application under s. 218(1)(f). The defendant is now refusing to sign the audited accounts for a number of reasons. Principally, the defendant is
I now saying, consistent with the requirements of s. 169 and s. 171

of the Companies Act, he is entitled to refuse to sign because of a discrepancy in the closing stock reflected in the accounts which show a discrepancy of RM3.5 million. Presently, the closing stock is reflected as RM7,967,677.77, and the defendant argues he is only exercising reasonable prudence expected of a director to ensure that the audited account present a true and fair account of the financial position of the company. The evidence discloses several excuses have been raised by the defendant to support his refusal to sign the present audited account, I can only conclude his basis of refusal leaves much to be questioned. The evidence reflects a somewhat curious and difficult attitude on the part of the defendant not to sign, despite the existence of a court order made by consent for him to do so. He has signed the management account which has the same closing stock figure, and it will be incongruous for him to now say he will not sign because of the very same closing stock figure because he must exercise reasonable prudence to ensure that the audited accounts presents a true and fair account of financial position of the company. After all, both directors, including the defendant have signed the board resolution authorising them to sign the audited accounts and the management account for the same financial year. Nevertheless, the issue that has to be addressed is a matter of law. If within the context of the Companies Act, a former director cannot be compelled to sign an audited account, then obviously this court cannot order the defendant to sign the present audited accounts of the company for year ending February 2009. Having considered the submissions of the parties and the law, including the provisions of s. 362(2) of the Companies Act 1965, and the definition of "director" under s. 4(1) of the Companies Act which defines the term as including any person "occupying" that position, I am of the view that it is not possible in law for this court to compel the defendant to sign the audited accounts for year ending February 2009, however objectionable his conduct might seem to the plaintiff and to this court. It becomes a matter of strict law, and even s. 362(2) does not assist the plaintiff in its attempt to compel the defendant, as an ex-director, to sign the audited accounts for the year in which he was a director. Section 362(2) allows any officer or former officer of the company who has "failed or omitted to do any act, matter or thing which by or under this Act" he is required or directed to do, he may be compelled to do that act but "on the application of the registrar

A or any member of the company or the official receiver or liquidator". It is only upon such an application for the purpose of ensuring compliance with any order, that the former officer shall be deemed "to have the same status, powers and duties as he had at the time of the act, matter or thing that should have been
B done". I agree with the argument of the defendant's counsel that this present application is an application by the company itself, and as such it cannot fall within the terms of s. 362(2), since, as I have indicated earlier, the application must be on the part of the registrar, or any member of the company, or the official receiver
C or liquidator. This application, in short, is not brought by any of these persons mentioned in the section. To succeed, the application on the facts of this case, should have been instituted by a member of the company, meaning a shareholder. This not being done, this court is therefore not vested with the jurisdiction
D under the Companies Act to compel the defendant to sign the audited accounts for year ending February 2009. As I have ventured to suggest, this is a matter of strict law and in the context of this case the maxim of *expressio unius est exclusio alterius* must have reference. Section 362(2) is express in its terms and
E mentions specific categories of persons who are allowed to apply, and the company itself being not specified as a person entitled to apply, it will be not in order for this court to exercise the powers under s. 362(2) and to regard itself as vested with the jurisdiction to compel a former director to sign the audited accounts for the
F year in which he was a director. It has to be noted, as a matter of practice, an audited account for a financial year which is done after that financial year, sometimes even many years after, has to be dated current. And this is the precise problem that this present case raises. The audited accounts for year ending February 2009
G will have to be dated current. If it is dated current, and if the defendant is made to sign as a former director, the accounts will be reflecting him as such director. This will not be regular, unless the Companies Act allows it and a proper application made thereunder. As for the signing of the management account, the
H evidence discloses that the management account was signed when he was still a director of the company. He had signed an undated letter of resignation as a director and this was put into effect after he had signed the management account. This was put into effect by the company, principally through the initiative of Lee, and this
I being the case, the company should not now insist that he sign

because the company is the party which has acted on his letter of resignation without ensuring that he signed the audited accounts first. In any event, there is nothing in law to prohibit any two present directors of the company from signing the audited accounts pursuant to the provisions of ss. 169 and 171 of the Companies Act. If there are shortcomings in the accounts, it is also the law that the directors in charge of the financial affairs of the company then, and indeed any or all of the directors who sat on board at the material time, will continue to be liable for any offence committed at the material time, if there is such offence disclosed and proven on the facts.

[5] For these reasons, I am therefore of the view that it is not possible in law to compel the defendant to presently sign the audited accounts for year ending February 2009. I am therefore dismissing this application, but I am not making any order as to costs bearing in mind the evidence in this case in relation to the curious and difficult conduct of the defendant. No order as to costs.